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No. 84-9

In The

Supreme Court of the United States

October Term, 1984

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY AND CECELIA STEVENSON

Petitioners,

vs.

DORIS RUSSELL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether, under the Employee Retirement Income Security Act, a fiduciary to an employee benefit plan may be held personally liable to a plan participant or beneficiary for punitive damages or extra-contractual compensatory relief for improper or untimely processing of benefit claims?

PARTIES TO THE PROCEEDING

The parties to this action are Petitioners, Massachusetts Mutual Life Insurance Company, and Cecelia Stevenson, and Respondent, Doris Russell. The claims against Cecelia Stevenson are not at issue in this appeal to the Supreme Court.

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BRIEF FOR RESPONDENT

I. STATEMENT OF THE CASE

In her response to the petition for certiorari, respondent, Doris Russell, has already objected at length to Petitioners' characterization of the facts of this case (pages 6-12). A further detailed discussion of the facts is not particularly relevant to the issues before the United States Supreme Court, as the Ninth Circuit did not base its opinion upon any particular set of facts.

II. SUMMARY OF ARGUMENT

There are two issues presented to the Supreme Court for its review, 1) whether an ERISA fiduciary may be held personally liable to a participant for extra-contractual damages for a breach of fiduciary duty and, 2) whether an ERISA fiduciary may be held liable for punitive damages for malicious, wanton, or bad faith misconduct.

ERISA, the Employee Retirement Income Security Act, 29 U.S.C. Section 1000 *et seq.*, provides broad equitable and legal remedies against fiduciaries who breach their duties. ERISA is remedial legislation which should be construed liberally in favor of those persons it was meant to protect, namely, participants and beneficiaries under covered pension and welfare plans. Congress intended that a body of substantive law be developed by the courts to fill in the gaps left by ERISA's provisions and to fulfill its purpose of redressing and preventing violations of the Act. The courts should look to federal common law and state law which is compatible with the purposes of ERISA.

Participants and beneficiaries are empowered by 29 U.S.C. Section 1132 to sue for breach of fiduciary duty under 29 U.S.C. Section 1109. Even if they were not, it would be appropriate to read a private right of action for participants and beneficiaries into Section 1109 because ERISA was enacted for their benefit, it was the intent of Congress to allow them broad remedies and their state law remedies have been preempted by ERISA. It would not be reasonable for Congress to occupy the field with respect to the interests of participants and beneficiaries in pension and benefit plans without providing federal protection and remedies to replace those barred.

Fiduciaries of ERISA should be liable for their breaches of duty which injure participants or beneficiaries. They may be held to a higher standard of conduct than required under traditional trust law. Fiduciaries should not be allowed to use ERISA as a shield.

Participants and beneficiaries are provided with a wide range of legal and equitable remedies under Section 1109 and Section 1132. Further, analogy to common law and state law for fiduciary tort liability and other federal labor statutes supports the availability of compensatory and punitive damages.

Extra-contractual damages should be allowed under ERISA to remedy the wrong, provide whatever remedies are necessary to make the aggrieved individual whole, and compensate for mental and emotional distress.

Punitive damages should also be allowed in limited circumstances where the fiduciary acts with actual malice, bad faith, or wanton indifference to the rights of a participant or beneficiary. Any possible deleterious effects are greatly outweighed by the benefits to participants and beneficiaries and the furtherance of the policy of ERISA by deterring and redressing violations of the act.

To hold that a plan participant or beneficiary can never be made whole through compensatory damages nor ever collect punitive damages for malicious or wanton acts would incorrectly immunize plan fiduciaries from liability for breaches of duty that injure plan participants and beneficiaries. Such a result is inconsistent with the express policy of ERISA.

III. REASONS WHY THE OPINION OF THE NINTH CIRCUIT SHOULD BE AFFIRMED

A. Introduction

The question presented by Petitioners to the Supreme Court for review is two-fold. One question is whether fiduciaries under ERISA may be held personally liable for extra-contractual damages for breach of fiduciary duty, which may include improper or untimely processing of benefit claims; and the other question is whether ERISA fiduciaries may be held personally liable to plan participants or beneficiaries for punitive damages for wanton, arbitrary, malicious, or bad faith misconduct of the fiduciary. It is misleading to combine the two issues, as Petitioners have done, because the standards for granting punitive damages are much stricter than those for compensatory damages. Petitioners suggest that either a beneficiary would be entitled to both punitive and compensatory damages against a fiduciary or to neither. Respondent submits that the court should consider these two questions separately.

In its well-reasoned decision below, the Ninth Circuit held that compensatory and punitive damages may be awarded under ERISA for breach of fiduciary duty. The Ninth Circuit held that extra-contractual damages should be available to remedy the wrong and make an aggrieved claimant whole. Additionally, punitive damages should be available in very limited circumstances where there is evidence of malice, wanton indifference or other outrageous conduct on the part of a fiduciary.

The Ninth Circuit stressed the remedial nature of ERISA and the intent of Congress to provide a comprehensive scheme of fiduciary responsibilities and duties encompassing both the management of plan assets and the handling and processing of participant's claims and to afford remedies for violation of those responsibilities, obligations, and duties. The court held that processing a claim in a perfunctory or arbitrary manner or in bad faith or without the exercise of reasonable care or failure to render a decision promptly within the required time limit would constitute a breach of fiduciary duty. The court pointed out that ERISA was intended to serve as a substitute for state protective laws and regulations and that it would be anomalous if Congress eliminated the protections offered by state law without providing comparable federal protections.

B. The Court Of Appeals Was Correct In Finding That ERISA Allows Claims For Compensatory Damages And Punitive Damages Against Fiduciaries For Breach Of Fiduciary Duty

1. Beneficiaries are entitled to broad equitable, and remedial relief under ERISA

Congress enacted ERISA in response to the dramatic growth of employee benefit plans in recent years and the importance they have assumed in the security of millions of workers. It was found desirable to assure disclosure and to create safeguards with respect to the establishment, operation, and administration of such plans. Congress noted in particular that existing law offered no assurance that these plans were financially sound or that they were administered in a way which actually gave workers the promised benefits. Congress sought to correct the pattern of wasting and looting which had resulted in denial

of benefits to the intended recipients of the plans. *Cate v. Blue Cross and Blue Shield of Alabama*, 434 F.Supp. 1187, 1188 (E.D. Tenn. 1977). *Wadsworth v. Whaland*, 562 F.2d 70, 73 (1st Cir. 1977). *Lederman v. Pacific Mutual Life Insurance Company*, 494 F.Supp. 1020, 1022 (C.D. Cal. 1980).

Congress expressed its legislative intent in 29 U.S.C. Section 1001(b) as follows:

> It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

The responsibilities and liabilities of fiduciaries are set forth in 29 U.S.C. Sections 1104 and 1109 (Sections 404 and 409 of ERISA). Section 1104 provides that the fiduciary is to discharge his duty with respect to the plan solely in the interests of the participants and beneficiaries and for the exclusive purposes of providing benefits to participants and beneficiaries and defraying reasonable expenses of administering the plan.

Under 29 U.S.C. Section 1109, a fiduciary who breaches any of his responsibilities, obligations, or duties shall be personally liable to the plan to make good for any losses resulting from the breach and to restore any profits to the plan, and shall be subject to such other equitable or

remedial relief as the court deems appropriate, including removal of the fiduciary.

The civil enforcement provisions of ERISA are contained in 29 U.S.C. Section 1132 (Section 502 of ERISA). A civil action may be brought by a participant or beneficiary to recover benefits due to him under the terms of the plan, to enforce or clarify his rights under the plan, to enjoin any act which violates ERISA or the terms of the plan, for appropriate relief under Section 1109 or Section 1025(c) or for other appropriate equitable relief. A participant or beneficiary may also recover $100 a day from the date of refusal of a fiduciary to comply with a request for information regarding plan procedures. Reasonable attorneys fees and costs are also allowed under Section 1132.

The congressional intent in enacting the enforcement provisions of ERISA was as follows:

> The intent of the committee is to provide the full range of legal and equitable remedies available in both state and federal courts and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcements of fiduciary responsibilities under state law or recovery of benefits due to participants.
>
> 1974 *U.S. Code Cong. and Ad. News* 4639, 4655, 4838, 4871.

Citing 29 U.S.C. Section 1132, the court stated in *Laborers Fringe Benefit Funds v. Northwest Concrete and Construction Inc.*, 640 F. 2d 1350, 1352 (8th Cir. 1981) as follows:

The legislative history underlying Section 502 indicates that Congress intended that the enforcement provisions should have teeth, the provisions should be liberally construed to provide both the Secretary and participants and beneficiaries with broad remedies for redressing or preventing violations of the Act.

Similarly, the court construed Section 1109 in *Gilliam v. Edwards,* 492 F.Supp. 1255, 1266 (D. N.J. 1980) as follows:

> ERISA Section 1109(a) captures Congress' intent to arm the courts with broad remedies for redressing the interests of participants and beneficiaries when they have been adversely affected by breaches of a fiduciary duty . . . . Thus, ERISA grants the court wide discretion in fashioning legal and equitable relief to make the plan whole and protect the rights of beneficiaries.

See also *Hillis v. Waukesha Title Co. Inc.,* 576 F.Supp. 1103, 1108-1109, (E.D. Wis. 1983) (Section 1132); *Freund v. Marshall and Ilsley Bank,* 485 F.Supp. 629, 634, (W.D. Wis. 1979); (Sections 1109 and 1132); *Corley v. Hecht,* 530 F.Supp. 1155, 1163, (D.C.D.C. 1982)(Section 1109); *Lechner v. National Benefit Fund,* 512 F.Supp. 1220, 1221, (S.D. N.Y. 1981) (Section 1132); *Eaves v. Penn,* 587 F.2d 453, 462, (10th Circuit 1978)(Section 1109); *Marshall v. Kelly,* 465 F.Supp. 341, 349 (W.D. Okla. 1978)(Section 1106).

a. Congress intended for federal common law to be developed to further the policy of ERISA

The United States Supreme Court held in *Shaw v. Delta Airline Inc.,* — U.S. —, 77 L.Ed. 2d 490, 500-502, 103 S.Ct. 2890 (1983), that ERISA preempts all state laws

which relate to employee benefit plans, such as those dealing with fiduciary responsibilities. 29 U.S.C. Section 1144. Therefore, ERISA preempts the California state causes of action that a claimant whose benefits are wrongfully denied would have for breach of fiduciary duty, breach of covenant of good faith and fair dealing, breach of the California Insurance Code Section 790.03, and intentional infliction of emotional distress, under which the claimant would be entitled to compensatory damages, damages for emotional distress, and punitive damages. *Egan v. Mutual of Omaha Ins. Co.,* 24 Cal. 3d 809, 157 Cal.Rptr. 482 (1979, *cert. denied,* 445 U.S. 912, 100 S.Ct. 1271, 63 L. Ed.2d 597 (1980), *Delos v. Farmers Insurance Group,* 93 Cal.App.3d 642, 650, 155 Cal.Rptr. 843 (1979), *cert den.* 455 U.S. 912, 100 S.Ct. 1271, 63 L.Ed. 2d 597 (1980), *Fletcher v. Western National Life Insurance Co.,* 10 Cal.App. 3d 658, 89 Cal.Rptr. 843 (1979), *Little v. Stuyvesant Life Insurance Co.,* 67 Cal.App. 3d 451, 463 (1977). The preemption of these remedies creates a void.

Petitioners do not address the void created by the preemption of state law protections, but merely argue that all of the remedies Congress intended to provide for beneficiaries are specifically set forth in ERISA, and no additional remedies should be implied.

As the Ninth Circuit correctly stated in its opinion herein, it would be anomalous for Congress to "occupy the field" with respect to the interests of participants and beneficiaries under pension and benefit plans without providing federal protections and remedies to replace those barred.

Congress clearly intended for the courts to create federal common law to govern various aspects of the em-

ployee benefit field and thus further the policies of ERISA in areas where state protections had been preempted. *Landro v. Glendenning Motorways, Inc.*, 625 F. 2d 1344, 1351, 1356 (8th Cir. 1980). *In re White Farm Equipment Co.*, No. C82-3709 (N.D. Ohio September 20, 1984). The court quoted the legislative history in *In re C.D. Moyer Co. Trust Fund*, 441 F.Supp. 1131, (E.D. Penn. 1977) as follows:

> It is also intended that a body of law will be developed by the courts to deal with the issues involving rights and obligations under private welfare and pension plans. 120 Cong. Rec. 515751 (daily ed. August 22, 1974)

The legislative history indicates that the courts were to create federal common law under ERISA in a similar fashion to the common law developed under Section 301 of the Labor Management Relations Act of 1974. (29 U.S.C. Section 185) 1974 *U.S. Code Cong. and Admin. News*, 5038, 5107. H.R. Conf. Rep. No. 93-1280, 93d Cong. However, this does not mean that identical rules of federal common law were necessarily to apply in claims under ERISA and under the LMRA. *Calamia v. Spivey*, 632 F.2d 1235, 1237 (5th Cir. 1980). Common law under ERISA was to be developed in accordance with the policies propelling ERISA, namely, to protect the interests of participants and beneficiaries in employee pension and welfare benefit plans. *Corley v. Hecht Co.*, 530 F.Supp. 1155, 1160, 1162 (D.C.D.C. 1982); *Gilliam v. Edwards*, 492 F. Supp. 1255, 1261 (D.N.J. 1980).

In *Texas Industries, Inc. v. Radcliffe Materials, Inc.*, 451 U.S. 630, 641-643, 68 L.Ed. 2d 500, 101 S.Ct. 2061 (1981), the Supreme Court acknowledged the authority of the courts to fashion federal common law in situations

where it is necessary to protect uniquely federal interests or where Congress empowered the federal courts to create governing rules of law, such as under Section 301 of the LMRA. The Courts may adopt state law in fashioning federal substantive law if the state law is compatible with federal labor policy. *Rehmar v. Smith*, 555 F.2d 1362, 1367-1368 (9th Cir. 1977) (LMRA); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457, 77 S.Ct. 912, 1 L.Ed. 2d 972 (1957) (LMRA).

The court addressed this issue in the context of ERISA in *Wayne Chemical, Inc. v. Columbus Agency Service Corp.*, 426 F.Supp. 316 (N.D. Ind. 1977) as follows:

> Where the courts are required themselves to fashion a federal rule of decision, the source of that law must be federal and uniform. Yet, state law where compatible with national policy may be resorted to and adopted as a federal rule of decision. [citation] Here, of course, there is little federal law to which the court may turn for guidance. State regulation of insurance, pensions, and other such programs, however, provides a pre-existing source of experience and experiment in an area in which there is, as yet, only federal inexperience. Much of what the states have thus far developed, particularly in the insurance field, is statutory. In certain areas of public concern, the state legislatures have been quite active in enacting comprehensive regulatory schemes, and state statutory sources of law will no doubt play a major role in the development of a federal common law under ERISA, particularly in defining rights under employee benefit plans.

See also, *Wayne Chemical, Inc. v. Columbus Agency Service Corporation*, 567 F.2d 692, (7th Cir. 1977) which mod-

ified the district court ruling but without dislodging the operative "federal common law" principles espoused in the lower court opinion, and *In re White Farm Equipment Co.,* No. C82-3709 (W.D. Ohio September 20, 1984).

The Supreme Court stated in *Sullivan v. Little Hunting Park,* 396 U.S. 229, 239-40, 24 L.Ed. 2d 386, 90 S.Ct. 400 (1969), in the context of housing discrimination, that where legal rights have been invaded, and a federal statute provides for the general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done. The existence of a statutory right implies the existence of all necessary and appropriate remedies. Both federal and state rules on damages may be utilized, whichever better serves the policies of the federal statute.

b. Participants may recover damages on their own behalf for breaches of fiduciary duty under Section 1109

29 U.S.C. Section 1109 (a) states as follows:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this Act.

Petitioners contend that Section 1109 does not authorize any relief whatsoever on behalf of individual participants or beneficiaries. They contend that Section 1109 makes relief available only to plans as a whole for breaches of fiduciary duty in the management or investment of plan assets (page 12). Petitioners argue that a beneficiary or participant is only entitled to the relief authorized in Section 1132, to recover benefits due under the terms of the plan or to enforce or clarify his rights under the plan.[1]

Nowhere in the language of Section 1109 or Section 1132 or in the legislative history of ERISA is it specified that *only* the plan may recover under Section 1109, or that beneficiaries and participants are limited to the remedies specified in Section 1132.

Petitioners argue that the language of Secti[illegible]09 should be strictly construed and remedies should [illegible] be implied beyond those expressly provided by Congress. However, it was the intent of Congress that the provisions of ERISA be construed liberally to provide benefi-

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1. Petitioners argue that the only penalty for failure to comply with the time limit specified in 29 CFR Section 2560.503 is that the claimant may treat the failure to comply as a denial for purposes of exhausting administrative remedies, relying on *Richardson v. Central States Pension Fund,* 2 EBC 1477 (8th Circuit 1981). This argument is unsupported and absurd. The issue in *Richardson* was whether the conclusionary decision of a Board of Trustees was sufficient to comply with Section 2560.503. The court merely restated the language of Section 2560.503(4) that failure to comply with mandatory time limits may be treated as a denial, but did not state this was the only result of failure to comply. Significantly, the Eighth Circuit found in favor of the beneficiary, stating as follows:

> The statute and the regulations were intended to help claimants process their claims efficiently and fairly; they were not intended to be used by the fund as a smoke screen to shield itself from legitimate claims.

ciaries and participants with broad remedies for redressing or preventing violations of the Act. *Gilliam v. Edwards,* 492 F.Supp. 1255, 1266 (D.N.J. 1980); *Corley v. Hecht,* 530 F.Supp. 1155, 1163 (D.C.D.C. 1982).

The courts have consistently interpreted the preemption provision of ERISA in its broadest sense, *Shaw v. Delta Airlines, Inc.,* — U.S. —, 77 L.Ed. 2d 490, 502, 103 S.Ct. 2890 (1983); *National Carriers' Conference Committee v. Heffernan,* 454 F.Supp. 914, (D. Conn. 1978); *Azzaro v. Harnett,* 414 F.Supp. 473, 474 (S.D.N.Y. 1976); with the result that all state protections and remedies for participants or beneficiaries have been barred by ERISA.[2] It would be inequitable to construe the preemption provisions broadly but construe the remedies provisions strictly, thus foreclosing the rights of beneficiaries and participants.

Section 1132 specifically allows beneficiaries to sue under Section 1109. However, even if it did not, a private right of action for participants and beneficiaries could be read into Section 1109. The primary factor to be considered in deciding whether a private right of action should be implied is whether Congress intended that the provisions of the statute be enforced through private liti-

2. A reading of 29 U.S.C. Section 1144(a) in conjunction with Section 1144(c) (2) would lead a strict constructionist to the conclusion that the "purports to" language of Section 1144(c) (2) defining "State" means only those laws that "intend to" regulate benefit plans should be preempted by ERISA. The "purports to" language would be considered a much stronger indicia than the "relates to" language contained in Section 1144(a).

gation.[3] The courts have listed four factors relevant to whether a private right of action should be implied:

(1) Was the statute enacted for the benefit of the class seeking relief?

(2) Did the legislative history declare an intent to create or deny such a remedy for participants?

(3) Is it consistent with the underlying purposes of the legislative scheme to imply such a remedy? and,

(4) Are the remedies sought traditionally relegated to state law in an area basically the concern of the States so that it would be inappropriate to infer a cause of action based solely on federal law? *Cort v. Ash,* 422 U.S. 66, 78, 45 L.Ed. 2d 26, 95 S.Ct. 2080 (1975); *Transamerica Mortgage Advisors, Inc. v. Lewis,* 444 U.S. 11, 26, 62 L.Ed. 2d 146, 100 S.Ct. 242 (1979); *California v. Sierra Club,* 451 U.S. 287, 292-3, 68 L.Ed. 2d 101, 101 S.Ct. 1775 (1981); *Osborn v. American Ass'n of Retired Persons,* 660 F.2d 740, 743 (9th Cir. 1981).

The first prong of the test is met in that ERISA's stated purpose was to provide additional protection and security for participants and beneficiaries and to ensure that they receive their benefits.

3. The over fifty million individuals covered under private pension plans and welfare benefit plans (Brief of Petitioner at p.24) have little hope that plan fiduciaries and administrators will be controlled, regulated, and policed by the Secretary of the Department of Labor. Rather than foisting the obligations to police this massive industry on the Secretary of the Department of Labor, a task that would require a department practically the size of all insurance departments of all fifty states, the Congress surely must have intended that this regulation and policing come from participants and beneficiaries.

With regards to the second factor, the legislative history is silent as to the remedies a participant has against fiduciaries of benefit plans who breach their duties to said participants.[4]

The third criteria is whether a private right of action is consistent with the underlying legislative scheme. ERISA was developed to more fully protect participants and beneficiaries. The underlying purpose of ERISA would, therefore, be better served by implying remedies for participants rather than implying immunity for fiduciaries.

With regards to the fourth prong, which is whether the remedies sought are traditionally the concern of the states so that it would be inappropriate to infer a cause of action based solely on federal law, state law has been completely preempted by ERISA. Congress intended for the courts to create federal common law to fill in the gaps left by ERISA's express provisions. Therefore, it would be appropriate for the courts to imply a private right of action with broad remedies for beneficiaries and participants under Section 1109.[5]

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4. The silence may be explained in part by the title of the Act itself, namely, the Employee *Retirement* Income Security Act. The main focus of Congress was on retirement plans rather than on benefit plans.

5. If Petitioners' strict construction of Section 1109 that only plans are allowed to collect damages from fiduciaries, were followed, it would create the absurd situation wherein an employer with a self-funded and self-administered benefit plan would be responsible (as a fiduciary) for paying itself (as a plan) for any gains or benefits it received at the expense of the plan participants.

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Petitioners argue that the court should not imply remedies beyond those expressly provided in ERISA because it is a "comprehensive legislative scheme". ERISA is a complicated and elaborate legislative scheme, but its focus is not upon the administration of benefit plans or the remedies available for wrongful conduct of fiduciaries in handling claims for benefits. Indeed, it is clear from the legislative history that Congress was primarily concerned with correcting abuses in vesting, funding, and disclosure of retirement plans.[6] ERISA is far from comprehensive with regards to the remedies for breach of fiduciary duty in the handling of benefit claims or other violations against participants by fiduciaries.

The Supreme Court noted in *Cannon v. University of Chicago,* 441 U.S. 667, 711, 60 L.Ed. 2d 560, 99 S.Ct. 1946 (1979), where it implied a private right of action under Title IV for a victim of sex discrimination, that the argu-

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A strict construction of the remedies available under Section 1109 would also force participants to subordinate or forfeit their rights for a more worthwhile "common good". The "common good" set forth by Petitioners appears to be the immunization and shielding of fiduciaries and purported smoother administration of plans due to the fiduciaries' peace of mind. Nowhere in the language of the statute or in the legislative history is there any reference to participants sacrificing legal protections for a more worthwhile common good much less for the purpose of shielding fiduciaries from liability.

6. The Act sets forth in great detail specific reporting and disclosure requirements, vesting standards and participation requirements and funding requirements of retirement plans. None of these provisions apply to benefit plans. ERISA is almost void of any mention of fiduciary responsibility in administering benefit plans. It is therefore not that surprising that there is nothing in the legislative history which indicates that compensatory or punitive damages are not recoverable by participants against fiduciaries in appropriate circumstances.

ment that other provisions of a complex statutory scheme create express remedies is not a sufficient reason to refuse to imply an otherwise appropriate remedy under a separate section. See also *Touche Ross & Co. v. Redington,* 442 U.S. 560, 582, 61 L.Ed. 2d 82, 99 S.Ct. 2479 (1979) (dissent of Justice Marshall).

c. The courts must imply protections for beneficiaries of self-funded and self-administered plans

There are basically three types of funding systems for ERISA benefit plans, namely, Taft-Hartley plans, insurance funded plans, and self-funded plans. Beneficiaries of Taft-Hartley multi-employer plans are protected by the provisions of the LMRA and by the collective bargaining system. As pointed out in the briefs of the amici curiae, Taft-Hartley plans are jointly administered by an equal number of representatives of management and representatives of labor. Fiduciaries receive no pay for their duties and have no incentive to act adversely to beneficiaries. The funds are totally segregated and independent. Contributing employers pay specified amounts into the fund from which benefits are distributed by the neutral trustees. It is impossible for an employer or trustee to benefit personally from wrongfully denying benefits (29 U.S.C. Section 186(c)).

Most of the amici curiae in support of petitioner represent Taft-Hartley plans. As pointed out by amicus curiae Steelworkers Union, Taft-Hartley plans with their built-in safeguards are not typical of ERISA plans and cover only about 25% of welfare benefit plan participants.

Insurance funded plans lack the protections of the LMRA, but are subject to state insurance regulations and

remedies, which are not preempted by ERISA (29 U.S.C. Section 1144(B)). *Eversole v. Metropolitan Life Insurance,* 500 F.Supp. 1162, 1170 (C.D. Cal. 1980). The employer pays premiums to the insurance company which handles claims for benefits and determines which claims are paid. The insurance company may be liable under state law for bad faith for compensatory and/or punitive damages for wrongfully denying a claim or for intentional infliction of emotional distress for outrageous conduct. *Fletcher v. Western National Life Insurance Co.,* 10 Cal. App. 3d 658, 89 Cal.Rptr. 843 (1979); *Egan v. Mutual of Omaha Insurance Company,* 24 Cal. 3d 809, 169 Cal.Rptr. 691, *cert. den.* 445 U.S. 912, 100 S.Ct. 1271, 63 L.Ed. 2d 597 (1980).

Beneficiaries of self-funded plans, however, lack comparable protections. The employer administers the plan and pays the benefits, often directly from the employer's general fund. The employer, thus, directly benefits whenever a claim is denied. Even when a separate fund is set aside by the employer, the employer can still reap rewards for wrongful denial of claims because the law requires only that the fund be maintained at a given level based upon actuarial computations. (29 U.S.C. Section 1082). If fewer payments are made to beneficiaries, the employer's funding requirements will be reduced.

The trustees of self-funded plans are generally employees who are often in a conflict of interest position, acting under the guidance and control of the employer. Although, the fiduciaries may not have a personal financial interest in denying claims, as employees they have much to gain in status, benefits, salary increases, and job security by acting in the interest of the employer rather than

the beneficiaries. *Leigh v. Engle*, 727 F.2d 113, 127 (7th Cir. 1984).

Section 1106(b) of ERISA sets forth clearly that a fiduciary may not act in the interests of the employer or in his own interest. However, ERISA sets forth no specific remedies for a beneficiary who is injured when a fiduciary does not act in the interests of the beneficiary. The courts should fashion remedies based on the common law of torts and bad faith insurance law to protect beneficiaries.

If the Court were to accept petitioners' position that participants have no rights or remedies against fiduciaries under Section 1109, then participants of self-funded plans who lack the built-in safeguards afforded under the Taft-Hartley plans and who lack the state remedies available under plans funded and administered by insurance companies, would be unprotected. ERISA was enacted specifically to protect participants against just such self-dealing situations and not to act as a shield for employers who are acting as fiduciaries.

d. It was not the intent of Congress to immunize fiduciaries from liability for breach of fiduciary duty

Petitioners contend that it was the intent of Congress that beneficiaries and participants not be allowed to recover damages from fiduciaries for their breaches of duty. However, Petitioners cite no authority to the effect that ERISA fiduciaries should have an immunity not accorded to fiduciaries in other capacities.

Petitioners base much of their argument for the unavailability of damages on the fact that ERISA was based

on the law of trusts. However, it is well-established in common trust law that a fiduciary is subject to liability to his beneficiary for harm resulting from a breach of duty imposed by the fiduciary relation.[7] In Restatement of the Law, Torts (2d) Section 874, it is stated:

> One standing in a fiduciary relation with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation.

Comment b to Section 874 provides in pertinent part as follows:

> A fiduciary who commits a breach of his duty as a fiduciary is guilty of tortious conduct to the person for whom he should act. The local rules of procedure, the type of relation between the parties and the intricacy of the transaction involved, determine whether the beneficiary is entitled to redress at law or in equity. The remedy of a beneficiary against a defaulting or negligent trustee is ordinarily in equity; the remedy of a principle against an agent is ordinarily at law. However, irrespective of this, the beneficiary is entitled to tort damages for harm caused by the breach of duty arising from the relation, . . .

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7. Judge Cardozo stated in *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545 (1928) as follows:

> "Many forms of conduct permissible in a work-a-day world for those acting at arms length are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is the standard of behavior. As to this there has developed a tradition that is unbending and inveterate.

There is nothing in the language of ERISA or the legislative history to indicate that these well-established principles should not apply to ERISA fiduciaries.

In fact, ERISA fiduciaries may be held to a higher standard of conduct than required under traditional trust law. In *Eaton v. D'Amato,* 581 F.Supp. 743 (D.C. 1980), the court noted that it was the intent of Congress to expand the scope of fiduciary standards of conduct to assure adequate protection for the interests of plan participants and beneficiaries. See also *Eaves v. Penn,* 587 F.2d 453, 457 (10th Cir. 1978); *Marshall v. Kelly,* 465 F.Supp. 341, 349 (W.D. Okla. 1978), *U.S. Code Cong. and Admin. News,* 4639, 5186 (93 Cong. 2d Sess. 1974).

Fiduciaries of ERISA plans may be held to a higher standard of duty than the "arbitrary and capricious" standard usually applied to trustees. *Rehmar v. Smith,* 555 F.2d 1362, 1371 (9th Cir. 1976). In *Struble v. N.J. Brewery Emp. Welfare Trust Fund,* 732 F.2d 325, 333-4 (3rd Cir. 1984), the court stated that the strict standard applies where it is alleged that fiduciaries have sacrificed valid interests to advance the interests of non-participants. Fiduciaries of self-funded plans are scrutinized even more carefully because they place themselves in a position with inherent opportunities for self-dealing and conflict of interest. *Donovan v. Bierwirth,* 680 F.2d 263, 271 (2d Cir.) *cert. den.* 459 U.S. 1069 (1982); *Freund v. Marshall & Ilsley Bank,* 484 F.Supp. 629, 639-44 (W.D. Wis. 1979); *Corley v. Hecht Co.,* 530 F.Supp. 1155 (D.D.C. 1982); *Leigh v. Engle,* 722 F.2d 113, 132 (7th Cir. 1984); *Viggiano v. Shenango China,* 574 F.Supp. 861, 866-67 (W.D. Pa. 1983). See generally *NLRB v. Amax Coal Co.,* 453 U.S. 322, 329-331, 101 S.Ct. 2789, 69 L.Ed. 2d 672 (1981).

An analysis of the law of trusts and case law under ERISA as well as the legislative history makes it very clear that ERISA fiduciaries are held to a high standard of fiduciary conduct and are liable for tort damages just like any other fiduciary when they breach their duties.

2. There is extensive support in the legislative history and language of ERISA for the availability of compensatory damages.

The congressional intent as evidenced in both the Senate and House reports was to provide for the full range of legal and equitable remedies available in both state and federal courts. Legislative History of Employee Retirement Act of 1974, Vol. III, at 4838 and 4871. Petitioners argue, however, that only equitable relief is available under ERISA and therefore compensatory damages may not be recovered.

Even if ERISA did only allow equitable relief, it would still provide for the equitable remedy of restitution to make the claimant whole and to restore the status quo. *Rogers v. Loether,* 467 F.2d 110 (7th Cir. 1972), *Marshall v. Kelly,* 465 F.Supp. 341, 354 (W.D. Okla. 1978), *Hillis v. Waukesha Title Co., Inc.,* 576 F.Supp. 1103, 1108 (E.D. Wis. 1983). In a discussion of the "make whole" provisions of Title VII, the Supreme Court stated as follows in *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 45 L.Ed. 2d 280, 95 S.Ct. 2362 (1975):

> Where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief . . . And where a legal injury is of an economic character, the general rule is, that when a wrong has been done, and the law gives a remedy,

the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed.

Furthermore, Section 1109 specifically provides for equitable or *remedial* relief for a breach of fiduciary duty. "Remedial relief" can mean legal relief, relief to remedy a wrong or an abuse, or relief to compensate an injured party. *Black's Law Dictionary.* 82 C.J.S. 918 (Statutes Section 388). If only equitable relief were provided, the statute would not have opposed the term "remedial" to "equitable". Therefore, in order to avoid having the term "remedial" be mere surplusage, it should be read that Section 1109 provides legal relief as well as equitable relief against fiduciaries.

The legislative history makes clear that ERISA was intended to be a remedial statute,[8] to correct and deter abuses in the administration of benefit and pension plans and to provide broad remedies for participants and beneficiaries. It would be inconsistent with this policy to limit remedies to equitable relief. Furthermore, several courts have specifically held that the use of the term "remedial" in Section 1109 authorizes legal relief. ***Bobo v. 1950 Pension Plan,*** 548 F.Supp. 623, 626 (W.D.N.Y. 1982); ***Gilliam v. Edwards,*** 492 F.Supp. 1255, 1266-7 (D.N.J. 1980); ***Donovan v. Robbins,*** 99 F.R.D. 593, 599 (N.D. Ill. 1983).

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8. A remedial statute is one that intends to afford a private remedy to a person injured by a wrongful act, one that is designed to correct an existing law, redress an existing grievance, or introduce regulations conducive to the public good, or one giving a party a mode or remedy for a wrong, where he had none, or different one, before. *Black's Law Dictionary.*

Congress failed to specify what types of appropriate equitable and remedial relief would be allowed under Section 1109 and Section 1132. However, it may be presumed that at the time of the enactment of ERISA in 1974, Congress was well aware of the remedies available under breach of fiduciary duty causes of action, including the availability of compensatory and punitive damages. *Carey v. Piphus* 435 U.S. 247, 260, 98 S.Ct. 1042, 1049, 55 L.Ed. 2d 252 (1978).

Section 874 of the Restatement of Laws, Tort 2d, states that breach of fiduciary duty is a tort entitling the one aggrieved to full compensation for all damages proximately resulting from the breach of duty. These may include compensatory and punitive damages resulting from the breach of duty. Section 874A provides for tort liability for violation of legislative provisions, with the following:

> When a legislative provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may, if it determines that the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision, accord to an injured member of the class a right of action, using a suitable existing tort action or a new cause of action analogous to an existing tort action.

ERISA constitutes the enactment of a statutory law of fiduciary duty. Consonant with the statutory enactment should be full and complete tort liability for breach of the fiduciary duty embodied in ERISA.

Petitioners make much of the distinction between equitable and legal relief to support their contention that compensatory and punitive damages are unavailable. Although under the English common law, courts of equity had jurisdiction over trusts, this distinction between courts of law and courts of equity has become archaic and they have merged. Petitioners' reliance on this formalistic distinction is misplaced.

Numerous cases have, in fact, held that compensatory damages are available under ERISA to remedy the wrong, make the aggrieved individual whole or compensate him for mental or emotional distress. *Free v. Gilbert Hodgman Inc.*, 3 Empl. Ben Case (BNA) 1010, 1012 (N.D. Ill. 1982), *Bobo v. 1950 Pension Plan*, 548 F.Supp. 623, 626 (W.D. N.Y. 1982), *Eaton v. D'Amato*, 581 F.Supp. 734 (D.C. 1980), *Monson v. Century Mfg. Co.*, 739 F.2d 1293, 1303, (8th Cir. 1984), *Bittner v. Sadoff and Rudoy Industries*, 490 F.Supp. 534, 536 (E.D. Wis. 1980), *UAW v. Federal Forge*, 583 F.Supp. 1350 (W.D. Mich. 1984).[9]

The court held that compensatory damages are recoverable under ERISA in *Jiminez v. Pioneer Diecasters*, 549 F.Supp. 677, 681 (C.D. Cal. 1982), stating as follows:

> To hold that a plan participant or beneficiary can never recover punitive or compensatory damages would immunize plan fiduciaries from liability for their intentional breaches of duty that injure plan participants and beneficiaries. Such a result is inconsistent with the express policy of ERISA.

9. Petitioners cite the case of *Bittner v. Sadoff & Rudoy Industries,* 728 F.2d 820, 825 (7th Cir. 1984), where the court held the ERISA conferred, under Section 1132, no right to sue in state court for mental suffering caused by a violation of the terms of the plan. Petitioners also rely on the case *Hurn v. Retirement Fund Trust,* 424 F.Supp. 80 (C.D. Cal. 1976), where the court also found in a conclusion of law that no damages for emotional distress are available under 1132. The Ninth Circuit in its opinion here found that compensatory damages are available under Section 1109 and therefore is not in conflict with the cases cited by Petitioners.

3. The availability of punitive damages is in accord with the policy of ERISA

a. Punitive damages should be allowed to redress and prevent violations of ERISA

The opinion of the Ninth Circuit that punitive damages are available under ERISA is based upon the legislative history, the policy of ERISA, and numerous case authorities. Congress intended to provide broad legal and equitable remedies for redressing or preventing violations of the Act. 1974 *U.S. Code Cong. and Ad. News,* 4639, 4655, 4838, 4871. The availability of punitive damages serves the important purpose of deterring and redressing violations of ERISA.[10]

Petitioners contend that the failure of Congress to mention the availability of punitive damages to employee

10. As the Supreme Court observed in *Day v. Woodworth,* 4 U.S. 363, 371, it was already well established in 1851, and had been so for more than a century before, that in all actions for torts a jury might inflict exemplary, punitive, or vindictive damages upon a defendant having in view the enormity of the wrongful conduct involved. Actually, the origin of the doctrine can find its roots established well before evolution of the English Common law. For example, in the Bible, Old Testament there is the statement:

> For every breach of trust, whether it is for ox, for ass, for sheep, for clothing, or for any kind of lost thing, of which one says, "This is it," the case of both parties shall come before God; he whom God shall condemn shall pay double to his neighbor. (Exodus 22:9)

benefit plan beneficiaries in actions under ERISA means that Congress must have intended not to allow the recovery of such damages. However, Congress failed to specify any type of relief which is available under Section 1132(a)(2) with regard to actions for appropriate relief under Section 1109. Congress must have expected the courts to fashion appropriate relief based on common law and state law, which would include punitive damages where it would further the policies of ERISA. If Congrass had indeed intended not to allow the recovery of punitive damages by beneficiaries for the tortious conduct of fiduciaries, then Congress quite easily could have so stated by providing that the full range of remedial and equitable relief otherwise available under Section 1109 would not include punitive damages.

It is well-established that punitive damages are available for breach of fiduciary duty under state law and common law. Punitive damages were awarded for breach of fiduciary duty in *Palmer v. Fuqua*, 641 F.2d 1146, 1160-61 (5th Cir. 1981) and *Financial General Bankshare Inc. v. Metzger*, 523 F.Supp. 744, 773-74 (D.D.C. 1981). Under California law, punitive damages have long been available under trust law for breach of fiduciary duty. *Clapp v. Vatcher*, 9 Cal.App. 462, 99 P. 549 (1908). In *Wershkull v. United California Bank*, 85 Cal.App. 3d 981, 149 Cal. Rptr. 829 (1978), and *Hannon Engineering, Inc. v. Strom Industries, Inc.*, 126 Cal.App. 3d 415, 179 Cal.Rptr. 78 (1981), punitive damages were allowed against fiduciaries of pension funds.

Punitive damages have also been allowed in a number of cases under ERISA. In *Eaton v. D'Amato*, 581 F.Supp. 743 (D.C. 1980), the court held that punitive damages are

available under Section 1109 where there has been a willful, malicious, or outrageous breach of fiduciary duty. Other cases allowing punitive damages include *Winterrowd v. David Freedman and Co., Inc.*, 724 F.2d 823 (9th Cir. 1984), *Jiminez v. Pioneer Diecasters*, 549 F.Supp. 677 (C.D. Cal. 1982), and *Kann v. Keystone Resources, Inc.*, 575 F.Supp. 1084 (W.D. Pa. 1983).[11]

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11. Respondent is aware that a number of courts have refused to allow punitive damages in their analysis of ERISA. However a distinguishing factor is that most of the analysis deals with the availability of punitive damages under 29 U.S.C. Section 1132. *Dependahl v. Falstaff Brewing Corporation*, 653 F.2d 1208 (8th Circuit 1981); *Calhoun v. Falstaff Brewing Corporation*, 478 F.Supp. 357 (E.D. Mo. 1979); *Hurn v. Retirement Fund Trust*, 424 F.Supp. 80 (C.D. Cal. 1976); *Bell v. Southern Oregon Log Scaling Bureau*, 1 EBC 1438 (D. Or. 1976); *Meyer v. Phillip Morris Inc.*, 569 F.Supp. 1510 (E.D. Mo. 1983); *Hechenberger v. Western Electric Co. Inc.*, 570 F.Supp. 820 (E.D. Mo. 1983); *Hoskins v. Retirement Plan of Standard Oil Company*, No. 78 C 3670 (N.D. Ill. 1983).

Other cases not allowing recovery of punitive damages may be distinguished by the fact that the punitive damages which were refused were sought against the plan. *Maxfield v. Central States, Southeast and Southwest Areas Health and Welfare and Pension Funds*, 559 F. Supp. 158 (N.D. Ill. 1982); *Diano v. Central States, Southeast and Southwest Areas Health and Welfare and Pension Funds*, 551 F.Supp. 861 (N.D. Ohio 1982).

Other cases reject the availability of punitive damages under sections other than Section 1132 or Section 1109 *Meyer v. Phillip Morris, Inc.*, 575 F.Supp. 1232 (E.D. Mo. 1983) (Section 1024 analysis) *Wilke v. Morton Thiokol, Inc.*, No. 84 C 1352 (N.D. Ill., June 26, 1984) (Section 1140 analysis).

Several cases failed to analyze ERISA at all so it is impossible to determine upon what basis the court determined that punitives are unavailable under ERISA. *Sheahan v. Leahy, etc.*, No. 84-1833C(B)(E.D. Mo. August 23, 1984); *Lewis v. Fulton Federal Savings and Loan Pension Plan*, 4 EBC 2071 (N.D. Ga. 1983); *Zittrouer v. Uarco Incorporated Group Benefit Plan*, 582 F.Supp. 1471 (N.D. Ga. 1984)

Only *Whitaker v. Texaco, Inc.*, 566 F.Supp. 745 (N.D. Ga. 1983) directly addresses the issue before this Court by analyzing Section 1109. However the Courts reading of the language of

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The 8th Circuit affirmed the allowance of punitive damages for fraud under ERISA in *Monson v. Century Mfg. Co.*, 734 F.2d 1293, 1305, (8th Cir. 1984). Congress clearly contemplated a civil action for fraud because ti specified a particular statute of limitations for fraud in Section 1113. Punitive damages are routinely available under state and common law for fraud. If Congress did not intend to allow them it surely would have so stated.

Petitioners contend that punitive damages should not be available under ERISA because ERISA contains elaborate requirements and makes extensive use of penal and criminal relief to accomplish its objectives. There are penalties for fiduciaries who fail to provide documents (29 U.S.C. Section 1132(c)), engage in prohibited transactions or mismanage assets of a fund (29 U.S.C. Section 1106), as well as for employers who fail to make contributions to multi-employer plans (29 U.S.C. Section 1106). ERISA also contains criminal penalties for willful violations of the reporting and disclosure provisions of the Act (29 U.S.C. Section 1131) and for willful interference with a beneficiary's exercise of rights under a plan (29 U.S.C. Section 1131). However, these criminal provisions are very rarely enforced. Respondents have found only one reported case where a fiduciary was convicted of misconduct. *U.S. v. Snyder,* 668 F. 2d 686 (2nd Cir. 1982), which involved embezzlement over one million dollars in plan assets.

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Section 1109 incorrectly limits the language "equitable or remedial" to mean only equitable. Furthermore, a number of these cases are called into question by the holdings of the Eighth Circuit in *Monson v. Century Mfg. Co.*, 739 F.2d 1293 (1984) and of the Ninth Circuit in *Winterrowd v. David Freedman and Co. Inc.*, 724 F.2d 823 (1984) that punitive damages are available under ERISA.

None of these provisions would effectively deter a fiduciary or employer from wrongfully denying a claim for benefits or from acting in bad faith towards a beneficiary. It was the stated purpose of ERISA to protect participants and beneficiaries. It would further this purpose to allow punitive damages against fiduciaries for malice, bad faith conduct, or wanton indifference to the rights of a beneficiary or participant.

b. The availability of punitive damages will not have deleterious consequences

Petitioners contend that the availability of punitive damages against fiduciaries will have a widespread deleterious impact on the conduct of fiduciaries. They contend that fiduciaries may feel compelled to process or settle unjustified claims out of fear of punitive awards against them, thus transgressing the principles of prudence and reasonableness to the financial detriment of the plan. Petitioners also express concern that qualified individuals will be deterred from serving as fiduciaries because of the possibility of personal liability.[12]

The opinion of the Ninth Circuit herein held that punitive damages may be available only in very limited circumstances where the fiduciary acts with actual malice or wanton indifference to the rights of a participant or beneficiary. The Ninth Circuit stressed this limitation

12. The Supreme Court rejected similar arguments in *Cannon v. University of Chicago*, 441 U.S. 677, 709, 601 Ed. 2d 560, 99 S. Ct. 1946 (1979) (Title IX).

again in *Winterrowd v. Freedman & Co.,* 724 F. 2d 823 (9th Cir. 1984). An ERISA fiduciary acting prudently and in good faith would have no need to worry about personal liability for punitive damages. Like any other fiduciary, an ERISA fiduciary would only be liable for willful, malicious, outrageous, or wanton conduct. Punitive damages would serve as an appropriate deterrent for fiduciaries who were inclined to abuse the fiduciary relationship, act adversely to participants and beneficiaries, or commit intentional tortious acts. It was surely not the policy of ERISA to protect such fiduciaries from liability for their tortious acts.

Petitioners urge that the allowance of compensatory and punitive damages in ERISA cases will have a severe and adverse impact on the administration of employee benefit plans. However, the impact of the availability of these damages on the administration of employee benefit plans will not be an adverse one. On the contrary, ERISA fiduciaries will be compelled to bring their conduct into accordance with the requirement of Section 1104 to act solely in the best interests of the participants and beneficiaries. The understanding that compensatory and punitive damages could be available to any plan participant or beneficiary whose claim is not timely processed and paid, or is denied on the basis of false, fraudulent, misleading, or otherwise tortious conduct, will force ERISA fiduciaries to process claims on the basis of accurate investigations and complete information, and under the precise terms of the plan in

question. It will deter fiduciaries of self-funded plans from acting adversely to the interests of the participants for their own financial gain or to further their own business interests.

Petitioners express concern that plan fiduciaries will sacrifice the interests of the plan by paying questionable claims out of fear of punitive damages. It is extremely doubtful that this might occur. In fact, given good, sound claims processing functions and investigatory abilities, questionable claims become less questionable; and payable claims remain payable. Claims utterly lacking in merit will not become meritorious simply because a thorough investigation has been done surrounding the merits of the claim. With regard to unmeritorious claims, it is foreseeable that there will be some individuals unwilling to accept unfavorable decisions on their claims who will file lawsuits and seek punitive damages. However, the simple prospect that such a person with an unmeritorious claim might seek to recover punitive damages does not warrant foreclosing the possibility of awarding punitive damages in appropriate cases to deter and punish outrageous conduct on the part of fiduciaries.[13]

Petitioners also argue that employee benefit plans may be reluctant to correct their own errors in fear that

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13. The possibility of large punitive damage awards should not justify the abandonment of the objectives of the statute or a weapon to protect participants. In addition, practically all of the large punitive damages verdicts in the insurance bad faith cases in California have been reduced, vacated, or otherwise limited; or where they have stood, the massive wealth of the defendant is such that even a million dollar verdict can be borne by the sufferance of merely a week's income. See *Pistorius v. Prudential Insurance Co.,* 123 Cal. App. 3d 541, 176 Cal. Rptr. 660 (1981).

this action would lay the groundwork for a punitive damages claim. This contention, as with the others proferred by Petitioners, seems to concede that plan fiduciaries do indeed commit tortious acts during the denial of otherwise legitimate claims, but to argue that they should not be held liable for them.[14] It was surely not the policy of ERISA to allow fiduciaries to refuse to correct errors which cause financial and emotional harm to beneficiaries for the sake of their own self-interest in not being sued. Furthermore, the fiduciary could prove his good faith by reversing an erroneous denial on review and thus avoid any basis for a claim for punitive damages.

Petitioners emphasize that the intent of Congress was to provide a non-adversarial method of claims settlement, arguing that the availability of compensatory and punitive damages will frustrate legitimate claims settlement. This contention seems to assume that plan beneficiaries deliberately disable themselves in order to set up compensatory and punitive damage claims. When a person has become disabled and submits a claim for disability benefits, he is unable to protect himself and needs a bona fide fiduciary looking after his interests. The claimant must repose trust and confidence in the claims processor to accurately assimilate all of the medical and other pertinent information, and to make a determination regarding the availability of

14. When mistakes are made, they simply must be corrected even at the expense of possible financial exposure beyond the mere entitlement to benefits. To do otherwise would do nothing more than lend express approval not only of the commission on intentionally tortious acts in the processing of benefit claims, but also the right to cover up that intentionally tortious conduct and refuse to learn from it in order to prevent abuses during the course of benefit claims processing. This simply cannot have been the intent of Congress in enacting ERISA.

disability benefits which is consistent not only with the medical information and the facts, but also with the law and the terms of the plan itself. A disabled claimant cannot be expected to wait in uncertainty for months without any income while a plan fiduciary denies an otherwise legitimate claim on the basis of misinformation, medical information which is in favor of the plan's viewpoint, or a self-serving construction of the benefit plan itself. ERISA fiduciaries simply cannot expect to be allowed to take unfair advantage of those otherwise unable to protect themselves.

Further, with regards to Petitioners' contention that the availability of punitive damages will discourage settlement on the part of claimants, it is as likely that the fiduciaries of a plan will be less inclined to compromise claims short of a lawsuit when they realize that the most the plan stands to lose in a lawsuit is the amount of the benefits denied. *Vasquez v. Eastern Airlines, Inc.,* 579 F.2d 107 (1st Cir. 1978) (ADEA).

In any case, the prompt, fair, and equitable payment of legitimate claims would obviate the ability of a participant to even make the argument for compensatory or punitive damages.

Petitioners also contend that the availability of punitive damages will result in a proliferation of litigation in the federal court. A similar argument in the context of actions for sex discrimination was rejected by the Supreme Court in *Davis v. Passman,* 442 U.S. 228, 248, 60 L. Ed.

2d 846, 99 S. Ct. 2264 (1979) on the basis that concern for conservation of judicial resources should not stand in the way of recognizing usually protected interests.

Considering the limited circumstances under which punitive damages would be available, it is very unlikely that a flood of unnecessary litigation would occur. Furthermore, ERISA provides for attorneys fees to the prevailing party. Thus claimants cannot pursue doubtful or frivolous litigation with impunity.

Petitioners argue that exposure of benefit plans to compensatory and punitive damages would endanger the financial soundness of benefit plans. Similar arguments were rejected by the court in *Wadsworth v. Whaland*, 562 F.2d 70, 78 (1st Cir. 1977) and *Eaton v. D'Amato, supra.* While protection of the financial soundness of plans is one of the aims of ERISA, the primary aim of ERISA is to protect the rights of beneficiaries. If one were to follow Petitioners' argument to its logical extension, one could argue that it would be in the best financial interests of the plan to never pay any benefits at all until sued. The intent of ERISA is to protect the financial souundness of plans for the sake of beneficiaries, not at the expense of beneficiaries. *Dist. 17, Dist. 29, Local U. 7113 v. Allied Corp.*, 735 F.2d 121, 133-4, (4th Cir. 1984).

Furthermore, the issue to be reviewed herein is not whether punitive damages should be available against the plan itself, but against the fiduciaries personally. Fiduciaries should not be able to use ERISA as a shield to protect them from liability for their wrongful acts toward participants.

4. Analogy to other Federal Labor Statutes indicates that compensatory and punitive damages should be available under ERISA.

Petitioners have analogized ERISA to the Labor Management Relations Act of 1947 (LMRA) (29 U.S.C. Section 185[a]), Title VII of the Civil Rights Act of 1964 (42 U.S.C. Section 2000e *et seq.*), and the Age Discrimination in Employment Act (ADEA), (29 U.S.C. Section 621 *et seq.*) claiming that compensatory and punitive damages are not available under the LMRA, Title VII, or the ADEA.

The House Conference Report on ERISA stated that ERISA actions are to be regarded as arising under the laws of the United States in a similar fashion to those brought under the LMRA. 3 *U.S. Code Cong. & Ad. News* 5106 (1974). Like ERISA, the LMRA addresses itself primarily to disclosure and reporting requirements rather than to the rights and remedies of beneficiaries for wrongful denial of benefits. Significantly, the provisions of the LMRA do not exempt or relieve any person from any liability, duty or penalty provided by state law. (Section 309).[15]

Since ERISA was patterned by Congress after the LMRA, the intent must have been to provide participants and beneficiaries with greater protection and additional remedies not heretofore available and not to deprive par-

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15. In *Farmer v. United Brotherhood of Carpenters and Joiners of America, Local 25*, 430 U.S. 290, 304-7 (1977), the Supreme Court held that emotional distress could be available under state law in a labor context where there was outrageous conduct apart from union discrimination in employment opportunities.

ticipants and beneficiaries of remedies which would have been available if ERISA had not been enacted.

Furthermore, compensatory damages have been allowed under the LMRA where there was outrageous conduct on the part of the union. The Eighth Circuit permitted a cause of action for mental distress arising from intentional union discrimination in *Richardson v. Communication Workers of America,* 443 F.2d 974, 984-5 (8th Cir. 1971). Similarly, in *Farmer v. ARA Services, Inc.,* 660 F. 2d 1096, 1107 (6th Cir. 1981), the Sixth Circuit held that damages for emotional distress were available for the union's breach of its duty of fair representation. Damages for emotional distress were also allowed under Section 301 in *UAW v. Federal Forge,* 583 F.Supp. 1350 (W.D. Mich. 1984). By analogy to the LMRA, compensatory damages should be allowed under ERISA where outrageous or malicious conduct has caused emotional distress.

Petitioners also contend that general and punitive damages are barred by Title VII and by analogy should be barred under ERISA. The courts have disagreed as to whether general and punitive damages are allowed under Title VII.

The legislative history of Title VII makes it clear that one of the purposes of Title VII was to make persons whole for injuries suffered as a result of unlawful discrimination. The courts are given wide discretion to grant relief to restore the person as far as possible to the position where he would have been were it not for the unlawful discrimination. 118 Cong. Rec. 7168 (1972). *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 418-420, 45 L.Ed. 2d 280, 95 S.Ct. 2362 (1975). Compensatory damages were allowed in *Tidwell v. American Oil Co.,* 332 F.Supp. 424 (Utah 1971), *Rosen v. Public Service Electric and Gas Co.,* 477 F.2d 90 (3rd Cir. 1973), and *Williams v. Trans World Airlines,* 600 F.2d 1267 (8th Cir. 1981).

The court ruled in *Scott v. Bradley,* 455 F.Supp 672, 673 (E.D. Vir. 1978) and *Spence v. Staras,* 507 F.2d 554, 558 (7th Cir. 1974) that punitive damages may be awarded under the Civil Rights statutes under certain aggravating circumstances. In *Kyriazi v. Western Electric Co.,* 476 F. Supp. 335, 340 (D.N.J. 1979), the court awarded punitive damages against the individual defendants to punish them and to deter future wrongdoing. See also *Claiborne v. Illinois Central Railroad,* 401 F.Supp. 1022 (E.D. La. 1975), *Tooles v. Kellogg Co.,* 336 F.Supp. 14 (D. Neb. 1972), *Developments in the Law—Title VII,* 84 Harv. L. Rev. 1109, 1262 (1971).

The Supreme Court recently held in *Smith v. Wade,* 461 U.S. 30, 75 L.Ed. 2d 632, 637, 103 S.Ct. 1675 (1983) that punitive damages are available under Section 1983, which gives a species of tort liability in favor of persons deprived of civil rights. The court noted that there was little in the legislative history concerning the damages recoverable for this tort liability and so it looked to the common law of torts with such modification or adaptation as might be necessary to carry out the purpose and policy of the statute.

Furthermore, like the LMRA, Title VII does not bar state remedies unless they directly conflict with Title VII. 42 U.S.C. Section 2000e (7). *Hays v. Potlatch Forests, Inc.,* 465 F.2d 1081 (8th Cir. 1972). The Seventh Circuit held in *Spence v. Staras, supra,* 558, that both federal and

state rules on damages may be utilized in civil rights actions, whichever better serves the policies expressed in the federal statutes. In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48-9, (1974), the Supreme Court stated:

> Moreover, the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to *supplement,* rather than supplant, existing laws and institutions relating to employment discrimination [emphasis added].

See also *Johnson v. Railway Express Agency,* 421 U.S. 454, 459, 44 L.Ed. 2d 295, 95 S.Ct. 1716 (1975).

Thus, if ERISA were patterned after Title VII and the LMRA, it would appear that ERISA was designed to supplement existing state and common law remedies rather than to bar them. Further, by analogy to Title VII and the LMRA, compensatory and punitive damages could be available under ERISA in appropriate circumstances.

Petitioners also argue that punitive and compensatory damages should not be available under ERISA by analogy to the ADEA. Punitive damages are not allowed under the ADEA, but the ADEA allows liquidated damages to provide full compensatory relief and to deter willful violations. *Dean v. American Security Insurance Co.,* 559 F.2d 1036, 1040 (5th Cir. 1977), *Pfiefer v. Essex Wire Corp.,* 682 F.2d 684, 687 (7th Cir. 1982). Title 29 U.S.C. Section 626(b) empowers the courts to grant such legal and equitable relief as may be appropriate to effectuate the purposes of the ADEA.

Many courts have held that compensatory damages are available under the ADEA in certain circumstances to

realize the purpose of the act. *Combes v. Griffin Television, Inc.,* 421 F.Supp. 841, 847 (N.D. Okl. 1976), *Coates v. National Cash Register Co.,* 433 F.Supp. 655, 664 (W.D. Vir. 1977). The district court noted in *Bertrand v. Orkin Exterminating Co.,* 432 F.Supp. 952, 956 (N.D. Ill. 1977) that Congress afforded plaintiffs a wide arsenal of remedies for the diverse injuries that may result from discrimination.

Unlike the LMRA and Title VII, ERISA preempts state remedies under which punitive and compensatory damages could be available. Unlike the ADEA, ERISA does not provide for liquidated damages. It would be anomalous for Congress to "occupy the field" with respect to the interest of participants and beneficiaries under pension and benefit plan without providing federal protections and remedies to replace those barred.

In its opinion, the Ninth Circuit compared ERISA to the Landrum-Griffin Act, the Labor Management and Disclosure Act (L.M.R.D.A.), (29 U.S.C. Section 411 and 412). ERISA and the LMRDA are similar in that the principle objective of both is to safeguard the rights of workers against the abuses or excesses of the institutions that exist to serve them. Like ERISA, the LMRDA is remedial legislation which should be liberally construed to effectuate its purposes. The right to recover punitive and compensatory damages has often been upheld in cases under the LMRDA. *International B'd of Boilermakers v. Braswell,* 388 F.2d 193, 199-201 (5th Cir.) *cert den* 391 U.S. 935, 88 S.Ct. 1848, 20 L.Ed. 2d 854 (1968), *Simmons v. Avisco,* 350 F.2d 1012, 1018-20 (4th Cir. 1965). In *Cooke v. Orange Belt Dist. Council of Painters,* 529 F.2d 815, 820 (9th Cir. 1976), the Ninth Circuit held that puni-

tive damages might be awarded under appropriate circumstances to serve as a deterrent to those abuses which Congress sought to prevent. In *Bise v. International Bro. of Electrical Wrkrs.*, 618 F.2d 1299 (9th Cir. 1979), the court allowed compensatory damages for emotional distress as well as punitive damages. By analogy to the LMRDA, compensatory and punitive damages should be allowed in ERISA cases.

The court stated in *Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1344, 1351, 1356 (8th Cir. 1980), that ERISA is remedial legislation which should be construed liberally in favor of those persons it was meant to benefit and protect, namely participants in and beneficiaries under covered pension and welfare plans. In light of the legislative policy behind ERISA, the opinion of the Ninth Circuit with regard to punitive and extra-contractual damages should be affirmed.

5. It would be appropriate to award compensatory and puntive damages in this case.

Petitioners lead the court to believe that the action herein is a simple and routine dispute involving denied employee benefits governed by ERISA. Petitioners contend that because Respondent Doris Russell availed herself of ERISA appeal procedures, recovered back benefits and was reinstated to employment, she should not be able to recover any damages for the actions of the fiduciaries in terminating her benefits and her employment.

Petitioners suggest that the only errors made by the fiduciaries were a good faith mistake as to her entitlement to disability benefits, and a brief delay in providing a decision on Respondent's appeal. In fact, the fiduciaries

breached their duties under ERISA repeatedly in their handling of her claim and her appeal.

The fiduciaries of the self-funded plan are long-time high-ranking employees of the company, and thus are in a conflict of interest position. They breached their duties under ERISA in the following ways:

Failing to review past medical records of Respondent although she had requested the fiduciaries to do so on more than one occasion (Section 1104(a)(1)(B);

Incorrectly applying the stricter standards of a totally different benefit plan to the detriment of Respondent and to the direct benefit of the company (Section 1104 (a)(1)(B) & (D));

Ignoring medical evidence submitted by Respondent's doctors and requiring unauthorized independent medical examinations (Section 1104(a)(1)(B) and (D));

Failing to process Respondent's claim in a timely manner, taking more than twice as long as the 60-day review procedure set forth in ERISA (Section 2560.503 (g) and (h));

Terminating Respondent's employment in order to avoid paying her additional benefits (Section 1140); and,

Generally acting in the best interests of the company and in wanton indifference to the interests of Respondent. Section 1104(a)(1) (A) (i) and Section 1106(b)).

The court should be aware that discovery was not yet completed when summary judgment was granted by the District Court on all causes of action. Thus, it is likely that additional breaches of fiduciary duty will be added to the above list.

Clearly all of these violations of ERISA's provisions and its policy constitute more than a good faith error, but rather are evidence of bad faith and self-interest. As a result of these breaches of fiduciary duty, Respondent was damaged economically and suffered severe emotional distress accompanied by physical illness. The sufferance of this type of economic and emotional harm simply cannot be excused or overlooked simply because a retroactive decision was made to provide benefits.

It would be appropriate in this case to award Respondent damages to compensate her for her economic loss and her emotional distress. Punitive damages would also be appropriate to deter the fiduciaries and others in a similar position from making a pattern and practice of acting in bad faith and in total disregard for the rights of participants under ERISA.

C. CONCLUSION

The opinion of the Ninth Circuit herein held that compensatory damages are available against a fiduciary under ERISA to remedy the wrong and make an aggrieved claimant whole where there has been a breach of fiduciary duty. The Ninth Circuit held that punitive damages are also available in very limited circumstances where there is evidence of malice, wanton indifference or other outrageous conduct on the part of the fiduciary. This is a well-reasoned opinion based upon a careful and detailed analysis of the stated policy of ERISA, the legislative history and the decisions of various circuits.

Petitioners attempt to make the decision appear reckless, poorly reasoned, and in conflict with the policy of ERISA and the majority of the case authority. Through their phrasing of the question presented for review and their misleading emphasis upon the facts of this case, Petitioners attempt to convince the Supreme Court that the Ninth Circuit has opened the door to a flood of trivial and frivolous litigation which will endanger the stability of ERISA plans and overburden the courts. Respondent has shown that this characterization of the decision of the Ninth Circuit is incorrect.

The decision of the Ninth Circuit is in harmony with the primary purpose of ERISA which is to protect the interests of participants and to provide broad remedies for redressing or preventing violations of the act. Respondent Russell respectfully prays that the opinion of the Ninth Circuit be affirmed.

Dated: December 18, 1984

Respectfully submitted,

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